Rescue Package For Fundamental Rights: Comments by ANNA KATHARINA MANGOLD

Anna Katharina Mangold 2012-02-15T15:22:47

In their post on Verfassungsblog, the Heidelberg research team around *Armin von Bogdandy* proposes to enrich the "substance" of European citizenship with the essence of fundamental rights and to let the ECJ control the observance of this substance, upon request of national courts in the member states. However sympathetic one might be towards the cause, the proposal encounters several fundamental objections:

Juridification rather than politicisation as mode of integration?

The ECJ has promoted European integration within its case law. In fact, for the most part the Court has altogether enabled European integration. The ECJ has produced the ingredients for an ever deeper Europeanisation of the member states' legal systems (and thereby for a deeper integration), often to the great astonishment of the contracting states. One need only think of direct effect (*van Gend & Loos*, 1963) and supremacy of Community law (*Costa v ENEL*, 1964), direct effect of directives (*van Duyn*, 1974) and liability of member states (*Francovich*, 1991), all of which saw the light of day due to ECJ case law solely.

It has been the approach of the Court to substitute political integration with legal integration. The approach worked unobservedly for a long time. It has, however, the serious disadvantage that member states are exempted from the duty to deepen the project of European integration politically since the member states do not have to struggle for compromises anymore – wherever doubt exists they can count on the ECJ to put the record straight and deepen integration.

The method of legal integration leads to the situation in which the project of European integration lacks support within the member states' populaces. The failed referenda in the Netherlands and in France clearly show this lacking support. People

neither understand the legal tricks of highly complex ECJ-decisions, nor identify their elected representatives as the authors of deepened European integration since it is the ECJ which provides the relevant stimuli. Besides, the elected representatives can always claim to be bound by European Union law and can weasel out of the cumbersome obligation to promote European integration in the member states' public spheres. (This connection has not been sufficiently reflected in *Habermas*' most recent essay in which he uncritically adopts the supremacy narrative of certain European lawyers.)

The proposal analysed here aims at deepening integration by legal means. Essentially, the systematic infringement of media freedom and other fundamental rights can be traced to a failure of domestic constitutional and fundamental rights culture in the member states concerned. This is a political problem with which can be solved solely by political means. A judgment of the ECJ, even a pivotal one, cannot get to the root of the problem.

The desire for a faster, less cumbersome, more efficient response to infringements of fundamental rights is all too understandable. In a democratic system, though, there are requirements for the negotiation of new better solutions, particular procedures are provided for. Hence, a democratic path has to be treaded to implement the proposal of a rescue parachute for fundamental rights; a detour through the back door of a highly complex construct of the essence of fundamental rights as the substance of Union citizenship will simply not work.

Union citizenship as doctrinal gateway for the proposal?

Union citizenship is the central element of the proposal, the doctrinal gateway if you like. Union citizenship was included in the Treaty of Maastricht in 1992 so as to provide Union law with the civic element deeply missed up until then. Since then, citizens of the member states are Union citizens at the same time.

It is unlikely the contracting member states envisaged what the ECJ would do with the new instrument. Union citizenship, ruled the ECJ, grants the "fundamental status" of political (as opposed to mere economic) affiliation to the European Union for nationals of the member states (*Grzelczyk*, 2001). On this basis, the ECJ obliged the member states to provide social security for non-national Union citizens (*Martinez Sala*, 1998; *Grzelczyk*, 2001), without the member states having contracted corresponding compensatory agreements.

Ruiz Zambrano, the case which is the starting point of the proposal of the rescue parachute for fundamental rights, deals with right of residence resulting from Union citizenship. Problematically, the case did not have any cross border aspect. After all, only cross border aspects turn Union law applicable, hereby securing both the principle of conferral and the principle of subsidiarity.

In *Ruiz Zambrano*, the ECJ used Union citizenship to find its way around the cross border aspect. Union citizenship provided the means for the ECJ to seize jurisdiction over a case that was not covered by its jurisdiction as traditionally understood – quite a surprising turn of events, as has been noted elsewhere.

By means of Union citizenship, the ECJ could circumvent the principles of conferral and subsidiarity. This explains why the proposal for a rescue parachute makes Union citizenship its starting point: Union citizenship allows reading political content into Union law which was not there before, and without observing the procedures provided for such purposes.

The comprehension of the strategy supplies an argument against it. One has not to resort to the backward-looking sovereignty rhetoric of the Lisbon-Judgment and can still acknowledge that the implications of the ECJ's interpretation of Union citizenship clearly indicate the necessity for member states to decide politically about any such extension. Member states should politically negotiate extensions of Union citizenship, they should not be introduced by the ECJ as an extensive interpretation.

One can understand the impatience of the ECJ which always wants more than is available at the moment in the process of political integration (especially when the Court strengthens rights of individuals as in aliens law). However, it should be reserved for democratically legitimised procedures to take further steps of integration in politically sensitive areas such as the scope of Union citizenship.

Therefore, it is not feasible to infuse Union citizenship with the essence of fundamental rights simply by way of the ECJ's interpretation. Rather, the member states should decide about such an extension of the meaning of Union citizenship. Such a step would change Europe as a community fundamentally, would establish a new, independent, not only derivative political affiliation. This would be such a far-reaching step that it would not be justified to introduce it through legal interpretation by the ECJ but that it would need explicit negotiation between the member states in public political communication.

The ECJ as guardian of fundamental rights?

The aim of the proposal discussed in this comment has to be appreciated, of course: more rights and better protection always sound good. Who would oppose it? Nevertheless, doubts arise whether the ECJ of all institutions is suited to do the job. The doubts are based on prior experiences with the ECJ and its way of dealing with the Union law. A normative-doctrinal approach towards the proposal will be contrasted with an approach towards the proposal that takes into account the "law in action" as it has appeared and evolved in history.

To begin with, the previous experience with the judicature of the ECJ makes it advisable to be extremely cautious in providing the Court with further competences. In hindsight still quite harmless was how the Courts constructed the direct effect of directives – contrary to the letter of the relevant treaty provisions (*van Duyn*, 1974). The Court authorised itself to examine framework decision which the member states had not wanted and therefore had explicitly excluded (*Pupino*, 2005). Naturally, this list could be extended manifold. The examples share the will of the ECJ to create access privilege and to use it when and wherever the Court sees fit.

Considering this situation, it does not seem feasible to allow the ECJ to deeply interfere with member states' legal systems. Whereas the authors consider it a

strength of the proposal that preliminary references by domestic courts should only be allowed in cases of systematic infringements, on the flipside exactly this precondition would ensure that resulting judgments of the ECJ will always have wide-ranging political consequences in the concerned member state. After all, this is the intention of the proposal – to create a mechanism to effectively fight systematic deficits in the area of human rights. Mind you, by legal, not political means.

Art. 51 Abs. 1 CFREU states that the Charter addresses member states “only when they are implementing Union law”. Although the authors claim that their proposal is not an extension of the scope of the Charter, certainly it is not a very narrow interpretation either. Admittedly, other proposals interpret Art. 51 Abs. 1 CFREU even more broadly. However, considering the history of the ECJ even with the proposal discussed here it must be feared that the Court will use this mechanism to control the political systems of the member states and to interfere with them on an unprecedented scale. Should it be the intention of the proposal to suggest a moderate interpretation of Art. 51 Abs. 1 CFREU under all those conceivable, at the latest the jurisdiction of the ECJ would not let it stand at that.

In the history of Germany, it did not work out to manifest the “essence of the essence” (“Wesen des Wesens”). It seems unlikely that this task will get any easier on the European level with 27 different constitutional traditions. Considering the record of the ECJ, which always displayed an extensive jurisdiction, it would be dangerous to offer the ECJ such a powerful tool.

Outlook: Hope for the protection of fundamental rights in political processes

Art. 2 and 7 TFEU state that member states among themselves shall address infringements of fundamental rights which do not occur while implementing Union law primarily by using political disciplinary measures. Discernibly and understandably, the authors of the proposal are disenchanted with the lack of political will to intervene against member states that infringe media freedom. In the past, such a will was more often than not was amiss. The dealings with Austria’s *Haider* in the 1990s, with Italian’s *Berlusconi* up until recently and with Hungary’s new government now have always been difficult.

Nevertheless, these experiences should not inhibit member states from communicating and demanding results. There are ways and means to improve the situation in political processes; an astonishing example was recently provided by Hungarian Prime Minister Viktor Orbán’s questioning in the European Parliament. This example shows how democratic responses to a national course considered misguided can look like. This experience raises hopes that political processes can bring about solutions, too.

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